JUL 2 4 2012

# Before the Federal Communications Commission Washington DC 20554

| FCC | Mail | Room |
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| In the Matter of                             | ) |      |  |
|--|---|------|--|
| Salashia Emericana Inc                       | ) | RM-  |  |
| Solvable Frustrations, Inc.                  | ) | KIVI |  |
| Petition to Amend Part 1 of the Commission's | ) |      |  |
| Rules to Specify Procedures for Class        | ) |      |  |
| Action Complaints                            | ) |      |  |

### PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Commission's rules, 47 C.F.R. § 1.401, Solvable

Frustrations, Inc. ("Solvable Frustrations") requests that the Commission modify its regulations
to create a specific class action complaint procedure. As detailed herein, such a procedure would
well serve the public interest by allowing similarly-situated consumers efficiently to obtain
recompense from carriers that violate the Communications Act or the Commission's rules.

Solvable Frustrations proposes procedures that would allow initial screening by the Commission
to determine whether class action treatment would be proper, thus minimizing the potential
burdens on complainants, carrier-defendants and the Commission.

Solvable Frustrations is a relatively new entity that seeks to provide monetary or other tangible results for its frustrated followers. This online social network aggregates customer complaints, and will use legal and media resources to convince or require wayward corporations or other entities to fix the damage they caused. Depending on the particular circumstances,

Solvable Frustrations has a beta website set up, which it hopes to have fully functioning in the very near future. See, <a href="http://solvablefrustrations.com/">http://solvablefrustrations.com/</a>.

consumers' complaints may be translated into administrative proceedings, lawsuits, boycotts and/or public pressure to change corporate practices. Solvable Frustrations believes that an FCC class complaint procedure could be an excellent and efficient tool to address unlawful acts by carriers.

# Class Actions can be an Efficient Means of Vindicating Rights

Class actions provide a number of benefits that reinforce the goals of the Commission.

One of the main advantages of class action lawsuits is allowing class members, in effect, to share litigation costs, and thus enjoy scale economies that can make litigation much more affordable. In the United States where, in almost all instances, a litigant must bear his or her own costs, the high price of litigation can discourage the bringing of legitimate claims. The ability to share the litigation costs also allows for more of a "level playing field," where a wealthy corporate defendant cannot simply use its greater resources to win a "war of attrition" in the courtroom.

Class actions also make it possible for a wronged individual to seek relief for even relatively small amounts of money. The sharing of litigation costs makes it practical to hire lawyers and experts to challenge a defendant that has wronged a large number of people, but where the amount of money lost by each individual would not justify the expense of litigation for just that person. In these situations, class actions can make a lawsuit financially prudent.

In addition, class actions create greater "judicial" efficiency. A class action lawsuit utilizes a single judge in a single court. Thus, the litigation will take up less cumulative court time and involve fewer judges than if each claimant proceeded individually in its own lawsuit. In a similar vein, the use of a single judge leads to greater uniformity of recoveries among

similarly situated plaintiffs. Because there will be only one decision by one judge -- or one settlement -- plaintiffs' recoveries will be consistent.

With regard to fairness amongst plaintiffs, a class action also has the advantage of providing the opportunity for all plaintiffs to receive damages. If a defendant is facing multiple lawsuits, the defendant may not have the ability to pay all of the plaintiffs. This could result in a situation where earlier filing plaintiffs (or plaintiffs that file in courts that act more rapidly) would receive greater compensation for similar injuries than do plaintiffs whose suits are resolved later. A class action lawsuit eliminates the risk that an injured parties' recovery will depend on when or where he or she files their lawsuit.

Class action lawsuits can benefit defendants as well as plaintiffs. Defendants, too, enjoy the "scale economies" of defending a single lawsuit rather than multiple lawsuits in multiple venues. Likewise, a single decision (or settlement) also creates greater certainty and uniformity for defendants. A defendant and others in situations similar to the defendant's situation are not faced with the potential for conflicting decisions creating differing obligations or standards for future conduct.

Courts have recognized these benefits of class action litigation. In Amchem Prods., Inc. v. Windsor,<sup>2</sup> the Supreme Court recognized that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." The Court went on to observe that "[a] class action solves this problem by aggregating the relatively paltry potential recoveries

<sup>&</sup>lt;sup>2</sup> Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997),

<sup>&</sup>lt;sup>3</sup> Id., 521 U.S. at 617, 117 S.Ct. 2231 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir.1997)).

into something worth someone's (usually an attorney's) labor."<sup>4</sup> The Seventh Circuit made this point even more directly:

It would hardly be an improvement to have in lieu of this single class action 17,000,000 suits each seeking damages of \$15.00 to \$30.00.... The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.00.<sup>5</sup>

By adopting class action complaint procedures, the Commission would likewise provide a mechanism for the vindication of consumers' rights in instances where the damage done by a carrier to any one customer would not justify his or her bringing of an individual formal complaint. Moreover, such procedures would create a much greater deterrent to violations of the Communications Act and the Commission's regulations, since class actions would enhance the likelihood that the carrier would be required to disgorge the fruits of its unlawful conduct.

# Class Action Procedures are Consistent with the Communications Act

Although there is some (unsubstantiated) language to the contrary in a few Commission decisions, class action procedures would be fully consistent with the Communications Act.

Commission decisions do state that "class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act."

<sup>&</sup>lt;sup>4</sup> Id., 521 U.S. at 617 (quoting Mace, 109 F.3d at 344).

<sup>5</sup> Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir.2004).

Halprin, Temple, Goodman and Sugrue v. MCI Telecommunications Corp., Memorandum Opinion and Order, 13 FCC Rcd 22568, 22581 (1998). The Commission has repeated this pronouncement on a number of occasions, but without any analysis of this issue. E.g., Bruce Gilmore, Claudia McGuire, The Great Frame Up Systems, Inc., and Pesger, Inc., d/b/a The Great Frame Up v. Southwestern Bell Mobile Systems, L.L.C., d/b/a Cingular Wireless, 20 FCC Rcd 15079 (2005); Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless, and New Par, 17 FCC Rcd 8987 (2002).

However, reminiscent of the childhood game of "telephone," this pronouncement is based on a misreading of earlier Commission decisions that did not actually analyze or address the compatibility of class action procedures with the Communications Act.

In the Halprin decision quoted above, the Commission provided no independent analysis, but merely cited two prior orders -- MCI Telecommunications Corporation v. Pacific Bell

Telephone Co., and Certified Collateral Corp. v. Allnet Communications Services, Inc., however, in the MCI Telecommunications Corporation v. Pacific Bell Telephone Co. decision, what the Commission actually stated was:

Accepting defendants' flow through argument would, in effect, transform MCI's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

The Commission thus was making an entirely different point. It was the transformation of MCI's claim into a class action on behalf of its customers – not class action suits themselves – that is "neither expressly contemplated nor consistent with the private remedy created under Sections 206-209 of the Act."

Nor is the Commission's conclusory statement in the *Halprin* decision supported by the Bureau's *Certified Collateral Corp. v. Allnet Communications Services* decision it cites. In that earlier decision, the Bureau simply indicated that "[o]ur Rules do not contemplate class action

http://wondertime.go.com/create-and-play/article/telephone-game.html

<sup>&</sup>lt;sup>8</sup> MCI Telecommunications Corporation v. Pacific Bell Telephone Co., 8 FCC Rcd 1517, 1526 (1993).

<sup>&</sup>lt;sup>9</sup> Certified Collateral Corp. v. Allnet Communications Services, Inc., 2 FCC Rcd 2171, 2173 (Comm. Car. Bur. 1987).

complaints, and we do not propose to accept such complaints for filing." The fact that the Commission's Rules did not contemplate class actions is a far cry from a claim that class actions are inconsistent with the complaint provisions of the Communications Act.

Indeed, Solvable Frustrations maintains that specific class action procedures would be fully consistent with the Communications Act. As an initial matter, we observe that Congress gave the Commission very broad authority to set its procedures in Sections 4 (i) and (j) of the Communications Act, 47 U.S.C. §§ 154(i) and (j):

We defer ruling on the issue of whether these complaints can be maintained as a class action suit until we are better able to assess the validity of the allegations contained in the complaint. We note that the Commission has no rule regarding the certification of classes or the procedures for maintaining class action suits like federal district courts do. Fed. R. Civ. P. 23.

Certified Collateral Corp., Euromarket Designs, Inc., D/B/A Crate And Barrel; Lily M. Feitler; Mark Hochman; Mcintosh Embossing, Inc.; Seymour Lazar; A. Linda Leventhal; Roger Lee And Belting Industries Co., Inc., On Behalf Of Themselves And All Others Similarly Situated V. Allnet Communications Services Inc.; Gte Corp. And Gte Sprint Communications Corp.; Mci Telecommunications Corp.; U.S. Telephone Of The Midwest, Inc.; The Western Union Telegraph Company; Itt-U.S. Transmission Systems, Inc., 1986 FCC LEXIS 3823 (March 19, 1986) at ¶ 6.

Id. at ¶ 14. As the Bureau also observed in that order, in its earlier procedural decision concerning that complaint, "[w]e noted that the Commission has no provisions regarding the certification of classes or procedures for maintaining class action suits." Id. at  $\P$  8. In that procedural order the Bureau held that:

## (i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

## (j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. 11

As the previous discussion demonstrates, class actions can serve as an efficient means to vindicate rights, particularly in cases where a defendant's unlawful conduct harmed a large number of people, but each person's injuries would not justify a separate, individual proceeding. Moreover, by providing such relief, carriers would be deterred from violating the Communications Act or the Commission's Rules. Class action complaint procedures would thus conduce "to the ends of justice."

That class action procedures would be consistent with the Commission's complaint procedures under the Communications Act is reinforced by Section 207 of the Communications Act, which gives a party the right to seek vindication for a carrier's violations of the Act either by filing a complaint at the Commission or by filing a lawsuit in federal district court. <sup>12</sup> Class

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

The Supreme Court has held that Section 4(j) provides the Commission with broad flexibility to design its procedures. FCC v. Schreiber, 381 U.S. 279, 290 (1965).

<sup>&</sup>lt;sup>12</sup> 47 USC § 207:

actions in federal courts preceded the Communications Act, <sup>13</sup> so that Congress' determination that a party injured by a carrier's actions had a right to sue in federal district court included the ability to bring a class action. Thus, class actions are certainly contemplated by, and consistent with, the private remedies created under sections 206 through 209 of the Act.

Indeed, the Commission's Rules already explicitly permit joinder of complaints.<sup>14</sup> Class action procedures are a somewhat more sophisticated form of joinder, which in appropriate circumstances can efficiently vindicate customers' rights. Insofar as the Commission believed that joinder of complaints is consistent with the Communications Act (as reflected in Section 1.723(a) of the Commission's Rules), class actions would be as well.

\* \* \* \* \* \* \* \*

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without great inconvenience, to make them all parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if they were before the court.

Class actions trace their roots back to eighteenth century English equity courts as an exception to the rule that joinder of all interested parties was necessary to obtain complete justice. This English practice was adopted in the United States as well. Indeed, twelve years before enactment of the Communications Act of 1934, in Supreme Tribe of Ben Hur v Cauble, 255 U.S. 356, 363 (1921), the Supreme Court addressed class actions:

Section 1.723(a) of the Commission's Rules, 47 C.F.R. § 1.723, provides:

<sup>(</sup>a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.

As demonstrated herein, class action procedures can be an efficient and effective means of protecting customers from unlawful conduct by carriers. Solvable Frustrations thus respectfully requests that the Commission initiate a rulemaking proceeding to adopt class action procedures for complaint proceedings. Attached are suggested rules based on EEOC administrative class action procedures, which can serve as a template for the Commission's rulemaking.

Respectfully submitted,

<u>/s/</u>

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### Proposed Rule

### § [1.737] Class complaints.

- (a) Definitions. (1) A class is a group of customers or competitors who, it is alleged, have been or are being adversely affected by a carrier's purported violation of the Communications Act or a regulation of the Commission.
- (2) A class complaint is a written complaint filed on behalf of a class by the agent of the class alleging that:
- (i) The class is so numerous that a consolidated complaint of the members of the class is impractical;
- (ii) There are questions of fact common to the class;
- (iii) The claims of the agent of the class are typical of the claims of the class;
- (iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.
- (3) An agent of the class is a class member who acts for the class during the processing of the class complaint.
- (b) Pre-complaint processing. An agent of the class must, in good faith, discuss or attempt to discuss the possibility of settlement with each defendant prior to the filing of a formal complaint as provided in Section 1.721(a)(8) of the Commission's rules.
- (c) Filing and presentation of a class complaint. (1) A class complaint must be signed by the agent or representative and must include all of the information specified by Section 1.721 of the Commission's rules.
- (2) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.
- (d) Acceptance or dismissal. (1) Within 90 days of the Commission's receipt of a class complaint, in order to conduct an initial assessment of the suitability of the complaint for class complaint processing, the agency shall assign the complaint to an administrative judge or complaints examiner. The administrative judge or complaints examiner may require the complainant or agency to submit additional information relevant to the complaint.
- (2) The administrative judge or complaints examiner may dismiss the complaint, or any portion, for failure to state a valid claim, or because it does not meet the prerequisites of a class complaint under §1.737(a)(2).

- (3) If an allegation lacks specificity and detail, the administrative judge or complaints examiner shall afford the class agent 15 days to provide specific and detailed information. The administrative judge or complaints examiner shall dismiss the complaint if the class agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge or complaints examiner shall advise the class agent how to proceed on an individual or class basis concerning these allegations.
- (4) When appropriate, the administrative judge or complaints examiner may decide that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.
- (5) The administrative judge or complaints examiner shall transmit his or her decision to accept or dismiss a complaint for class complaint processing to the agency and the agent. The agency shall take action by issuing an order within 40 days of receipt of the hearing record and administrative judge's or complaints examiner's decision. The order shall notify the agent of the decision of the administrative judge or complaints examiner and either assign an administrative judge to process all or some of the complaint as a class complaint, or deny the request to treat the complaint as a class complaint. A denial of the request for processing as a class complaint shall inform the agent that it may proceed as an individual complaint that will be processed under §§ 1.720-1.736.
- (e) Notification. (1) Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the class agent shall use reasonable means, such as publication, delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.
- (2) Such notice shall contain:
- (i) The name of the Commission, its location, and the date of decision accepting the complaint for class complaint processing;
- (ii) A description of the issues accepted as part of the class complaint;
- (iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and
- (iv) The name, address and telephone number of the class representative.
- (f) Discovery. Discovery of a class complaint shall be governed by Section 1.729 of the Commission's rules.
- (g) Hearing. On expiration of the period allowed for preparation of the case, the administrative judge shall determine whether it is best to conduct remaining proceedings under the Formal

Complaint procedures (47 C.F.R. §§ 1.720 et seq.), or the Hearing procedures (47 C.F.R. §§ 1.201 et seq.).

- (h) Report of findings and recommendations. The administrative judge shall transmit to the Commission a report of findings and recommendations on the complaint, including a recommended decision.
- (i) Notification of decision. The class agent shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. Notice shall be given by the class agent within 30 days of the transmittal of the final decision to the class agent.
- (j) Attorney's Fees. In cases where the class complaint results in the recovery of monetary damages, the administrative judge shall have authority to award attorney's fees under the Common Fund doctrine (Trustees v. Greenough, 105 U.S. 527 (1882)).